IN THE MATTER OF THE ARBITRATION BETWEEN	)	
WeadWestvaco Corporation Coated Board Division, Mahrt Mill	)	**FMCS FILE NO: 04-55818-3**
	)	**Grievance No. 2004-003**
and	)	**GRIEVANCE, RE: Subcontracting**
PACE, Local 3-1972	)	**GRIEVANT:** David Gilmore on behalf of PACE, Local 3-1972

OPINION AND AWARD

ARBITRATOR: DANIEL R. SALING, Esq.

AWARD DATE: March 10, 2005

APPEARANCES FOR THE PARTIES

AGENCY: Townsell G. Marswhall, Jr.
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WITNESSES:

For the Union:

David Gilmore
Joe Aplin
Samuel Mitchell

For the Company:

Larry Casey
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PROCEDURAL HISTORY

The Paper, Allied-Industrial Chemical and Energy Workers International Union (AFL-CIO) Local Union 3-1972 (PACE), hereinafter referred to as the "Union." MeadWestvaco Corporation, Coated Board Division, Mahrt Mill, hereinafter referred to as the "Company." The labor agreement between the Union and the Company hereafter referred to as the "Agreement." The Federal Mediation and Conciliation Service, hereinafter referred to as "FMCS."

The grievance at issue, FMCS 04-55818-3, also known as Grievance 2004-33, was filed on March 17, 2004, and thereafter processed in accordance with Article 19 of the Agreement between the Union and the Company. Following unsuccessful attempts to resolve the grievance, it was referred to arbitration. In accordance to the terms of the Agreement, Daniel R. Saling was appointed at the Arbitrator.

An arbitration hearing was held on Wednesday, January 12, 2005, at the Wyndham Hotel in Columbus, Georgia. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses and oral argument. All witnesses were allowed to remain in the hearing room and all witnesses were duly sworn.

The parties elected to file post-hearing briefs and agreed that the briefs were to be postmarked no later than March 7, 2005. It was agreed each party would submit two briefs and an envelope pre-addressed to the other party and the Arbitrator would upon receipt of both briefs serve each party with the opposing counsel's brief by United States Mail. The last post hearing brief was received on March 8, 2005.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE 4 MANAGEMENT

The Management of the Company and the direction of the working force, including, but not limited to, the right: to hire employees; to plan, direct, control and schedule all operations; to determine when work is to be performed; to schedule the work force; to establish, eliminate, change, or introduce methods, processes, equipment, standards, and facilities; to determine the size and composition of the work force; to determine the location of its operations; to determine the continuation of such of its departments and job classifications as it deems necessary and to maintain order are rights solely of the Company and are not abridged except as specifically restricted by a provision of this Agreement.

The Company will not misuse the Management clause in arbitrations nor will the supervisors use it as an excuse for not hearing a grievance.

ARTICLE 19 GRIEVANCE AND ARBITRATION PROCEDURE

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FIFTH STEP: If the reply of the Human Resources Manager or his/her representative is unsatisfactory to the Union, the Union may appeal the grievance to an impartial arbitrator by having the International Representative so inform the Human Resources Manager within fifteen (15) days of the receipt of the Fourth Step answer.

The Company representative and the representative of the International Union shall select the impartial arbitrator. At any time thereafter that either party believes it appropriate, he/she may request from the Federal Mediation and Conciliation Service a panel of seven (7) arbitrators' names. From the names submitted by the Federal Mediation and Conciliation Service, the two representatives shall select the impartial arbitrator within fifteen (15) days from the postmark date which appears on the envelope received from the Federal Mediation and Conciliation Service.

The impartial arbitrator shall recognize that all rights of management belong to the Company except to the extent this Agreement specifically provides otherwise, nor shall he/she have any power to add to or subtract from or in any way modify this Agreement. It is understood where the contract language is ambiguous, Past practice shall be utilized, where pertinent, to clarify the intent.

After the impartial arbitrator has heard the facts and evidence presented, he/she shall render a decision in writing within twenty-one days. The parties may, by mutual agreement, request the impartial arbitrator to render a verbal decision at the hearing

verified by a simple written statement. The decision shall be final and binding on all parties to this agreement.

The cost of the impartial arbitrator shall be borne equally by both parties concerned. A Stenographic reporter may be used in the arbitration procedure only with the consent of the signatory parties.

The settlement of any grievance at any step by the Union or the Company shall be final and binding upon all the parties to this Agreement.

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MAINTENANCE

Departmental Agreements and Understandings.

ARTICLE 21. ASSIGNMENT OF WORK.

GENERAL UNDERSTANDINGS

All maintenance employees will receive instructions from maintenance foremen. In an unusual situation where other maintenance supervisors need to give instructions to maintenance employees, they will make a point to inform the employee's Maintenance Supervisor of such instructions as promptly as possible.

Contracting Out Work

Work normally performed by maintenance employees will not be contracted out except during maintenance repair shutdowns or in case of emergency [emphasis added]. Should this paragraph be violated and such maintenance work is contracted out, maintenance employees who are qualified to perform such work will be made whole for the hours the contractor's employees worked.

Installation of new equipment is not considered to be maintenance work. Should the Company decide at any time to assign work on the installation of new equipment to maintenance employees, no future claim of jurisdiction to other new work will be made by the Union.

In addition to maintenance repair shutdowns and emergencies, the following categories of maintenance work normally performed by maintenance employees may be contracted out when the job equals or exceeds 640 manhours.

1. Modification of existing equipment
2. Work normally performed by maintenance
3. Replacement of existing parts
4. Major repairs

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Definition of the job under 640-hour provision

Six hundred and forty (640) hours is the total number of hours required to make repairs, complete a modification of existing equipment, make replacement of existing parts, or perform other work normally performed by maintenance. It includes both work that can be done on the run and work that can only be done when a system is shut down. On big jobs which are less than 640 hours, the Union and Company may agree to contract out a specific job where it makes good business sense [emphasis added]. In turn, they may also agree to assign a job over 640 hours to the Mahrt Maintenance Department. This shall not be used as a claim for future work by either party.

Examples of work which can and cannot be done under the 640- hour job:

1. Repairs of the Kamyr digester center pipe would be a 640-hour job and would include removing the top separator; however, it would not include work such as on the liquor heaters or liquor pumps.
2. Replacement of a refiner includes modifications and changes necessary for the refiner such as different piping, changed switchgears, foundation changes, and similar items associated with that unit.
3. The change out of primary head box job would not include press work as a part of the primary head box job (additionally see example 4).
4. The total rebuild of the wet end of the paper machine is one 640-hour job and could include press work, head box work, and fourdrinier work to complete the total rebuild.
5. The paper machine steam header line which supplies both the paper machine and the coater is one job.
6. Replacement of a large number of dryer bearings on the paper machine and coater is a job; but would not include the replacement of paper rolls bearings.
7. The white liquor line from recausticizing to the Kamyr digester and to the batch digesters is a job.
8. The replacement of a group of soot blowers on a boiler is one job if the work exceeds 640 hours.
9. Additionally, a 640-hour job includes work necessary to do the job, such as moving or relocating any item caused by the job.

The above items are examples of 640-hour job, but are not all inclusive.

Any work which is contracted out under this 640-hour provision stands completely by itself. The equal hours provisions of this Article do not apply to 640-hour work.

Maintenance work normally performed by maintenance of less than 640 hours may be contracted out by mutual agreement during outages. A shutdown of an area or system of the mill for less than 24 hours will be considered an outage. A scheduled shutdown of the mill, an area, or system of the mill for 24 hours or more will be designated a maintenance repair shutdown. If so designated by the Company, then contractors may be utilized in the appropriate area to perform work normally performed by Maintenance employees. Additionally, the company may declare a pre-shutdown period during which shutdown rules will apply and during which contractors may be used.

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MAINTENANCE WORK DEFINITION

1. For the purpose of this Article, maintenance work shall be defined as running repairs, ordinary plant maintenance, usual shop work, and modification of existing equipment.

   Modification of equipment shall include replacement of parts or items of existing equipment and shall not otherwise apply to installation of new equipment or on capital projects which exceed $500,000. Modification of equipment shall exclude work that employees do not have the skill, the tools, or, as mutually agreed upon, the time to do the work on a timely basis.

2. Maintenance work normally performed by Maintenance employees is the maintenance work that has been done most of the time by Maintenance employees [emphasis added]. For example, maintenance painting has not been done most of the time by Maintenance employees and thus having a contractor do such painting is not a violation. On the other hand, virtually all mobile crane repair work has been done by Maintenance employees and contracting such work out would be restricted to maintenance repair shutdowns or an emergency. Other mobile equipment repair that Maintenance employees have done most of the time is Maintenance work normally done by Maintenance employees and would be subject to the same restrictions. When mutually agreeable to both the Union and Management and, if available, equipment exchange programs can be used. Current exchange programs will be continued, but any future exchange programs will be mutually agreed upon.

An emergency is a situation that places normal operation in jeopardy or causes a loss of production.

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GRIEVANCE ISSUE TO BE RESOLVED

The parties were unable to stipulate to a submission agreement and asked that Arbitrator to frame the issue following the hearing.

It was the Union's position that the issue be framed as whether the Company violated Article 21 of the Agreement by subcontracting the repair of the #4 bark hog. The Company took the position that the issue should be framed in a way to determine if the Company violated Article 21 of the Agreement by subcontracting the rebuild of the #4 hog rotor.

The difference between the parties, with regard to the submission statement, can be differentiated as the Union wishing to see the work done on the bark hog as a "repair," while the Company wishes to see the issue as a "rebuild" of the # 4 bark hog rotor.

Having heard the evidence presented by both parties, I have determined that the issue in this arbitration proceeding is as follows:

Did the Company violate Article 21 of the Agreement by subcontracting out the rebuild of the #4 bark hog rotor?

FACTUAL BACKGROUD

The MeadWestvaco Corporation, Coated Board Division, (Company) operates a paper mill known as the Mahrt Mill, in Phenix City, Alabama. The Mahrt Mill has been in operation for many years and produces commercial paper products for business and industry. The Paper, Allied-Industrial Chemical and Energy Workers International Union (AFL-CIO) Local Union 3-1972, PACE, (Union) represents the mill workers that work in the Maintenance Department. The Company and Union have negotiated numerous Agreements over the years and the current Agreement was entered into on November 1, 2001, and remains in full force and effect to the current date (JX 1).

As part of the paper making process, a machine known as the "Bark Hog" is used to strip bark off of fallen trees prior to the time that the wood is prepared for use in making paper products. The bark hog removes the outer bark from the fallen trees and pulverizes the bark into material that is then transported to an area where it is burned to power boilers that then produce energy to run the mill.

On or about March 11, 2004, the Company had employees of the Maintenance Department remove the #4 Bark Hog Rotor from its housing and sent it to Holley Machinery, Inc. to be welded and rebuilt. After the bark hog was removed and was being loaded for transport to the outside contractor, the Union objected claiming that the work should not be subcontracted because the work was that of the Maintenance Department under the provision of Article 21 of the Agreement.

The Union steward in Area E of the plant, Mr. David Gilmore, expressed his concerns that the Company was violating Article 21 of the Agreement to Mr. Russell Bat, the Area E Foreman. Mr. Gilmore immediately filed a Step One grievance with Mr. Russell and Mr. Gilmore asked that members of the Maintenance Department be made whole for all hours worked on the # 4 bark hog by the outside contractor.

The Grievance was denied at Step One of the grievance procedure and the grievance was taken to the Second Step on March 22, 2004. The grievance was denied by Mr. Larry, Maintenance Superintendent, and evidence was attached to the Second Step denial that indicated the Company in the past and on a routine basis contracted out the rebuilding of all the plant's bark hogs and that the work on the #4 bark hog was not the type of work normally performed by employees of the Maintenance Department (JX 2).

Following the Company's denial of the grievance at Second Step of the grievance procedure, the grievance was processed to the Third Step. On April 26, 2004, Tim Becraft, Director of Engineering/Utilities Maintenance, denied the grievance. In his answer Mr. Becraft responded to the Union's position that that since part of the work being done on the #4 rotor had been performed by maintenance in the past, that the rotor assembly rebuild should be the Maintenance Department's work, since they had the skills and equipment to perform the work. Mr. Becraft, indicated that under Article 21 of the Agreement, Maintenance Work is defined as work normally performed by maintenance employees and is work that is most of the time performed by maintenance employees, and that the rebuilding of the bark hog rotors had been performed off-site many times over the years, and the work had not been by the Maintenance Department most of the time (JX 2).

The grievance having been denied at Third Step of the grievance procedure was then processed to the Fourth Step. On April 26, 2004, Lana Thomas-Folds gave the Company answer to the grievance at Step Four. The Company at Step Four addressed the concern of the Union that the Company had not discussed subcontracting out the rebuild of the #4 bark hog prior to the time it was shipped out for rebuild. The Company responded by indicating that the Company did not have to meet with the Union to discuss those repairs or rebuilds that were not work normally performed by the Maintenance Department.

The grievance having been denied at Fourth Step of the grievance procedure was then processed to the Fifth Step, Arbitration. The parties requested a list of potential arbitrators from the FMCS and Daniel R. Saling was selected to hear the case. The arbitration hearing was held on Wednesday, January 12, 2005, at the Wyndham Hotel in Columbus, Georgia.

UNION POSITION

It is the position of the Union that the Company was without authority to have the rebuild of the # 4 bark hog done by an outside contractor. The Union contends that the work of rebuilding the bark hog had been previously performed by Maintenance Department employees and claimed that the work had been subcontracted out only a few times and during those times, the Union had either agreed to have the work contracted out or the work fell under one of the listed exceptions in the Agreement.

The Union contends that under terms of the Agreement that when a repair or rebuild takes less than 640-manhours, the Union and Company can agree to contract out the rebuild, if it makes good business sense. Also the Union contends that the Company and Union can agree to assign work to the maintenance department for jobs that will take longer than 640 hours to complete. The Union believes that the work of rebuilding the # 4 bark hog was a job that would take less than 640 hours to complete, and that the Maintenance Department had the skill and equipment to do the work, and that without the Union's approval, the Company could not subcontract out the work.

The Union contends that on several occasions when the Company desired to subcontract out the work of rebuilding a bark hog, the Company had discussed its wishes with the Union under the language in the Agreement regarding jobs of less than 640-manhours prior to having the work completed outside of the plant (JX 1, p.C-9).

The Union testified that the Company is limited in its ability to subcontract out work by the expressed terms of the Agreement. The Agreement clearly indicates that work normally performed by the maintenance employees will not be contracted out except during maintenance repair shutdown or in the case of an emergency. The Union testified that the predominate practice has been for maintenance employees to perform running repairs, ordinary plant maintenance, usual shop work and modifications of existing equipment. The penalty for having violated this section of the Agreement is to make employees in the maintenance department whole for the hours that the contractor's employees had worked on the job (JX 1, p. 9).

The Union indicated that the Company has the right to subcontract out work in the installation of new equipment in addition to maintenance repair during shutdowns or emergencies. Further, other work normally performed by Maintenance employees may be contracted out when they are equal or are in excess of 640-manhours [emphasis added]. Further, the Agreement indicates that any mutual agreement with regard to the definition of jobs under the 640 hours provision will not be used to claim future work by either the Union or the Company. The work that may be subcontracted is in the area of modification of existing equipment, work normally performed by maintenance, replacement of existing parts and major repairs, but the Union and Company must agree to have this work contracted out (JX 1, p. C-9). The Union contends that when the Company wishes to subcontract work out and the work will take less than 640 hours to complete, that the Company must meet with the Union and an agreement must be reached before the subcontracting can take place.

The Union contends that the work performed on the # 4 bark hog on March 11, 2004 was work normally done by employees of the Maintenance Department and it was the type of work that was done most of the time by that department. The Union testified that when the Company had subcontracted out the rebuild of the bark hog in the past that the Company had met with the Union and the Union had agreed to have the work subcontracted. The Union indicated that in the present case, the Company did not seek mutual agreement to have the work subcontracted but did so claiming that it had the right to do so under the terms of the Agreement.

The Union believes that the work that was performed on # 4 bark hog was the type of work that is normally performed by the maintenance employees and that under the expressed terms of the Agreement that the Company was without authority to have the work performed by an outside contractor. It is the position of the Union that the Company has violated Article 21 of the Agreement and that the grievance must be sustained and the employees in the Maintenance Department must be made whole for the work that was performed by the employees of the Holley Machine, Inc., on the # 4 bark hog in March of 2004.

COMPANY POSITION

It is the Union's burden of proof to show that the Company violated Maintenance Article 21 of the Agreement when it contracted out the rebuilding of the #4 bark hog rotor to Holley Machinery, Inc., as alleged in FMCS case file No. 04-55818-3, which is also known as local Grievance No. 2004-33.

The Company's position is that the arbitrator must recognize that all rights of management belong to the Company with the exception of those rights restricted by provisions of the Agreement (JX 1, p. A-35).

The Company believed it had specific rights reserved in Articles 4, 19 and 21 of the Agreement, that allowed the Company to contract out maintenance work when such work was not "normally performed by maintenance employees" [emphasis added] (JX 1, p. C-9). The Company indicated that the phrase "maintenance work normally performed by Maintenance employees" is defined in the Agreement to mean, "maintenance work that has been done most of the time by Maintenance employees, [emphasis added] (JX 1, C-11).

In support of its argument that the Agreement gives the Company the right to contract out work that is not normally performed by Maintenance employees, the Company placed into evidence the arbitration award of Arbitrator J. Thomas Rimer, Opinion and Award in FMCS No. 79K07141 arbitration, dated November 1, 1977 (JX 3). In Arbitrator Rimer's award, he concluded that, while Maintenance employees had performed the work sent out

to a contractor, in that case, such evidence was "qualitative and not quantitative" (JX 3, p.5). Arbitrator Rimer interpreted the language of Article 21 as having required that the Company's Maintenance employees perform the work at issue in that particular arbitration, "a majority of the time on a regular basis" [emphasis added] (JX 3, p. 5). In upholding the right of the Company to contract out repairs of electric motors and in denying the Union grievance, Arbitrator Rimer set out the following:

> "The determination of the means of doing the work is a matter reserved to the Company in Article 4 unless restricted by a provision of the Agreement. That limitation is only one of quantity, i.e., is the work normally, routinely, and for most of the time performed by maintenance employees? The evidence is conclusive that the practice has been to contract out a majority of the repair work under all but circumstances which have occurred infrequently. It is not a question of whether the employees have performed most types of repair in the recent past, as they testified, for they have done so. But they have not done it "most of the time."(JX 3, p.6)

The Company witness testified that the mill maintenance employees do not perform rebuilding of bark hog rotors "most of the time," and that such work was not "work normally performed by maintenance employees." It therefore is the position of the Company that it had the right under the terms of the Agreement and from past practice to contract out the rebuilding of the #4 bark hog rotor to Holley Machinery Service, and that this action did not constitute subcontracting.

The Company challenged the arbitration award and opinion of Philip A. LaPorte, dated September 11, 1995, (JX 4) introduced into evidence by the Union that sustained a Union grievance on Article 21 regarding subcontracting. The Company believes that Arbitrator LaPorte had sustained the subcontracting grievance because the grievance concerned contracting out of repair work on a mobile boom crane, and the clear and unambiguous language of Maintenance Article 21 explicitly set out in both Sections 2 & 5 that repair work on mobile cranes was defined as maintenance work. While arbitrator LaPorte upheld the grievance he did so because of the expressed language of the Agreement, but the Agreement does not contain such explicit language with regards to the #4 bark hog rotor rebuild (JX 4)

The Company indicated that the testimony of Union witnesses David Gilmore, Joe Aplin and Samuel Mitchell spoke only to the welding of "flight," i.e., rakers or teeth, onto the disks on the rotor and not the rebuilding of the rotor. The Company pointed out that David Gilmore, providing rebuttal testimony, expressly states that the only work that was subcontracted to Holley Machinery, which the Union was claiming to be their work, was the welding of the flights on the bark hog rotor. Mr. Gilmore further testified that that the only personal knowledge that he had of welding flights on the bark hog rotors was when the rotor was in place in the bark hog housing. The Company pointed out that none of the Union witnesses had any first hand knowledge that the mill Maintenance employees had ever rebuilt a bark hog rotor.

The Company believes that its documentation and repair histories clearly show that the rebuild of all the bark hog rotors have been performed by outside contractors and none have been performed by mill Maintenance employees (CX 15-23).

The Company contends that it was only at step 4 of the grievance procedure that the Union claimed the there was a contractual duty that the Company meet with the Union and seek agreement prior to the time that the bark hog could be removed and sent to an outside contractor. Mr. Casey testified that the Company normally has a spare bearing housing on site and, when necessary, the mill Maintenance employees simply install the new housing. He further testified that on one occasion in 1998, the Company did not have a spare bearing housing on site and the mill maintenance employees installed a new housing. It was at that time when there was no spare bearing housing that it was easier to have the contractor sleeve the bearing housing while the contractor was rebuilding the bark hog rotor. For this reason the Company met with the Union because the bearing housing had to be sleeved and the Company wanted to have it done outside by the contractor. The Company claims that but for the bearing housing having to be sleeved, there would not have been a meeting between the Company and the Union. The Company contends that the rebuilding of the bark hog rotor is not work normally performed by mill Maintenance employees and, therefore, there is no reason to meet with them prior to the time the rotor is sent out to an outside contractor.

The Company believes that the evidence clearly shows that the rebuild of the bark hog rotors is not work normally performed by Maintenance employees, and the Company was permitted to contract out the work without having to have approval by the Union. It is the position of the Company that the grievance is without merit and should be denied.

DISCUSSION AND FINDINGS

Article 21 of the Agreement provides clear and unambiguous language with regard to the rights of the Union and Company with respect to subcontracting out maintenance work. The Agreement clearly delineates the work that is within the jurisdiction of the Union and gives specific parameters when subcontracting may be done by the Company. The evidence presented at the time of the arbitration must be evaluated with respect to express terms of the agreement regarding the subcontracting out of the rebuild of # 4 bark hog in March of 2004.

The Agreement clear states that work normally performed by the Maintenance employees will not be contracted out except during maintenance repair shutdowns or in the case of an emergency [emphasis added]. If the Company violated this provision of the Agreement, the employees of the Maintenance Department are to be made whole by receiving compensation for the hours of work performed by the employees of the subcontracting firm.

There are a number of sections in the Agreement that allow the Company to subcontract, specifically with regard to the installation of new equipment. Further, there are provisions in the Agreement that allow the Union and Management to enter into an agreement to allow work that is normally done by the Maintenance Department to be contracted out if that decision makes good business sense.

Article 21 of the Agreement delineates between work that takes less than 640 hours to complete and those jobs that takes more than 640 hours to compete the work. The Union is given jurisdiction over this work, which includes making repairs, completing modifications to existing equipment, making replacements of existing parts, or performing other work normally performed by Maintenance for work that can be completed in less than 640 hours. This work includes work that can be done on the run and work that can only be done when the system is shut down. Even though this work is considered to be the work of the Maintenance Department, the Agreement allows the Union and the Company to mutually agree to contract out work of less than 640 hours duration if the decision makes good business sense (JX 1). This section of the Agreement also allows work in excess of 640 hours to be done by the Maintenance Department. It is understood by both the Company and the Union and under these provisions of the Agreement that this does not establish a waiver or past practice to allow either party to claim future work.

The two sections of the Agreement that must be fully examined in light of the evidence presented is found in Article 21, wherein the Agreement defines that work normally performed by the Maintenance Department is Union work. The key issue in this language is, what is meant by the term "work normally performed" [emphasis added] (JX 1, p. C-9)? The answer to this question lies with the definition of maintenance work found in Article 21, Maintenance Work Definition, section 2 of the Agreement. This section of the Agreement defines "maintenance work normally performed by Maintenance employees" as maintenance work that has been done most of the time by the Maintenance employees [emphasis added].

The Union presented an Opinion and Award by Arbitrator Philip A. LaPorte (1995) that had sustained a subcontracting grievance and the Union asked that this arbitrator take judicial notice of the award (JX 4). In this arbitration award the issue was one of contracting out work on the repair of a mobile boom crane. In accordance to Article 21, Maintenance Work Definition, section 2, of the Agreement the language expressly states that, "…virtually all mobile crane repair work has been done by Maintenance employees, and contracting such work out would be restricted to maintenance repair shutdowns and emergency (JX 1, p. C-11). The clear and unambiguous language of the Agreement clearly supports the decision of Arbitrator LaPorte, but, in the current case, there is no such clear and specific language that expressly states the rebuilding of bark hog rotors is the jurisdiction of the maintenance department.

The Company, in support of its position that the grievance should be denied, introduced the Award and Opinion of Arbitrator J. Thomas Rimer (1980), and asked the arbitrator to

take judicial notice of the decision (JX 3). In this decision Arbitrator Rimer addresses the very contract language that is the basis of this arbitration. The issue in his case was whether the repair of electric motors was work normally performed by mill maintenance employees [emphasis added]. In his analysis of the facts of his case, Arbitrator Rimer concluded that, while Maintenance employees had performed the work sent out to a contractor, such evidence was "qualitative and not quantitative" (JX 3, p. 5). Arbitrator Rimer went on in his analysis to determine that Article 21 required that the Company Maintenance employees perform the work in question "a majority of the time on a regular basis" [emphasis added] (JX 3, p.5).

It is a well established principle in labor law that management has the right to control methods of operation and direct the work force and those rights are limited only by the expressed terms of the Agreement. It is clear that under Article 4, Management, that management has retained it rights, and both the Union and the Company understand that those management rights cannot be abridged except as specifically restricted by the provision of the Agreement (JX 1, p. A-2). Further, under Article 19 of the Agreement, the impartial arbitrator is admonished to recognize that all rights of management belong to the Company except to the extent the Agreement specifically provides otherwise (JX 1, p. A-35).

Under Article 21, Assignment of Work, the Agreement allows the Company to contract out work that is not "normally performed by the Maintenance employees" (JX 1, C-9). The phrase "maintenance work normally performed by Maintenance employees" is defined in the Agreement to mean "maintenance work that has been done most of the time by Maintenance employees" [emphasis added] (JX 1, C-11).

In reviewing the evidence presented by both the Union and the Company at the arbitration hearing, there is no showing that the rebuilding of bark hogs has been work that normally has been done most of the time by Maintenance employees. There is little doubt that the Maintenance Department has welded on the "flight," i.e., rakers, or teeth, onto the disks of the rotor, but there is no evidence presented that a complete rebuild of the bark hog has ever been done by Maintenance employees. The Company presented a complete repair history and other documented evidence that indicated that all rebuilds of the bark hogs have been contracted out, and, at no time have the Maintenance employees ever rebuilt a bark hog (CX 15-23). The fact that the Maintenance employees from time to time repair the bark hog does not constitute a rebuild.

The language of the Agreement is clear and unambiguous and clearly allows the Company to contract out the rebuilding of the bark hog rotors. Further, the Company testified that the reason the "flight" was welded on by the subcontractor was that the rotor had to be balanced, and it was necessary that the "flight" be on the machinery when the balancing was done. The welding of the "flight" during the rebuilding of a bark hog is different that the weld on of the "flight" when the bark hog is in position, and the welding constitutes a repair and not a complete rebuild.

The Union presented testimony that indicated that in the past the Company has, in accordance with the Agreement, met with the Union and gotten their agreement to allow work to be contracted out. In the Union's testimony they gave only one instance when a meeting occurred between the Company and the Union regarding contracting out work on the bark hog, and that meeting occurred in 1998. A Company witness, Mr. Casey, testified that the meeting that the Union spoke of did occur but indicated that this was an exception and not the normal practice of the Company. Mr. Casey testified that the Company normally kept spare bearing housing on site and when necessary, the mill Maintenance employees would install the new housing. In 1998 when there were no spare bearing housings and the Company determined that it would be easier to have the contractor sleeve the bearing housing while the contractor was rebuilding the bark hog rotor, the Company sought agreement from the Union to contract out the work normally performed by the Maintenance employees. For this reason the Company met with the Union and it was agreed that the work would be contracted out. The Company testified that it was only because the bearing housing had to be sleeved that there was a meeting held between the Company and the Union. The Company contends that the rebuilding of the bark hog rotor is not work normally performed by mill Maintenance employees and, therefore, there is no reason to meet with the Union prior to the time the rotor is sent out to an outside contractor.

The language of the Agreement is clear and unambiguous with regard to when the Company can contract out maintenance work, but assuming that the language was unclear and ambiguous, the arbitrator would then be required to look at the past practice to determine the rights of the Company to contract out maintenance work. If one was to apply the concept of past practice to the present case, the result would not be different. The Company records clearly show that the bark hog rotor rebuilds have historically been done by outside contractors.

A "past practice" is nothing more than the way things have been done. Such practice does not have to be written down in a collective bargaining agreement, but can arise on the basis of regular, repeated action or inaction by management. In Article 19, Grievance and Arbitration Procedure, Fifth Step, the arbitrator is directed to use past practice when the language of the Agreement is ambiguous to help clarify the intent of the parties (JX 1, A-35).

Generally, the existence of the following four factors will indicate that a "past practice" exists: (1) the practice was clear and applied consistently, (2) the practice was not a special, one-time benefit or meant at the time as an exception to a general rule, (3) both the union and management knew the practice existed and management agreed with the practice or, at least, allowed it to occur and, (4) the practice existed for a substantial period of time and occurred repeatedly.

The evidence presented by the Company clearly shows that for many years, the Company has sent the bark hogs out to have them rebuilt. There is little question that the practice was clear and consistent. The practice occurred numerous times over many years and this was not a one time occurrence. The record is clear that even if the language of the

Agreement was ambiguous, there has been a past practice created which gives the Company the right to contract out the rebuilding of the bark hog rotors.

The evidence also shows that the rebuild of # 4 bark hog rotor was not the type of work normally performed by Maintenance employees, and the expressed terms of the Agreement support the Company's right to contract out the rebuild of the # 4 bark hog rotor to the Holley Machinery Services, Inc. The Company did not violate Article 21 of the Agreement, and the grievance is hereby denied.

AWARD

For the reasons hereto stated, I, Daniel R. Saling, the duly appointed impartial Arbitrator in this matter, do hereby find and decide that the Company did not violate, misinterpret and or misapply the language of Article 21 with regard to subcontracting out the rebuild of the # 4 bark hog rotor. For this reason, the grievance is denied.

_____ March 10, 2005

Daniel R. Saling, Esq. Date